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THE ARREST OF HIS PRINCIPAL BY THE BAIL MAY BE MADE IN ANOTHER STATE THAN WHERE THE BOND IS GIVEN AND THE BAIL MAY TRANSFER HIM THERETO WITHOUT INFRINGING HIS RIGHT UNDER THE FEDERAL CONSTITUTION TO DUE PROCESS OF LAW.

The relationship of a bail and his principal arises out of the relationship the parties have established between themselves, and not by a court process, so that, a bail making the arrest of his principal anywhere he finds him, in the United States, is justifiable. An interesting case of this sort is that of In re Von der Ahe, 85 Fed. Rep. 959. Chris Von der Ahe is a picturesque character in St. Louis; gained great notoriety as the president of the victorious "Brown Sox" base ball team, captained by Charles Comiskey, now president of the "White Sox" team of Chicago. It seems that Chris got into trouble in Philadelphia whereby an action of trespass for malicious prosecution was brought against him under the laws of Pennsylvania, in Allegheny County. Chris was arrested by virtue of a capias and taken into custody. To procure his release, he secured one, Nimick, to "go his bail." The condition of the bond was that he (Von der Ahe) "shall satisfy the condemnation money and costs, or surrender himself into the custody of the sheriff of Allegheny County, or in default thereof, that said W. A. Nimick, the above named bail, will do so for him." Chris was released, but the case went against him, and was finally affirmed in the supreme court. Under the Pennsylvania practice, it is notable that the bail may discharge themselves by a surrender of the principal at any time prior to fourteen days after the service of the *scire facias*, or summons, issued after the termination of the action, and upon the execution of the bond, "it shall be lawful for the bail therein, to have, from the officer by whom it is taken, a bail price," etc. Chris, having failed to pay the judgment or surrender himself to the sheriff, Nimick, the bail, on February 3rd, 1898, took out a bail piece, duly and properly certified. By indorsement thereon, Nimick authorized Bendell, the respondent, to execute the same, and in his "behalf, to take, seize and surrender to the sheriff of Allegheny County, Pennsylvania, said Chris Von der Ahe." In pursuance of such authority, Bendell subsequently came to St. Louis, having secured assistance, seized Von der Ahe on the street, and by main force, put him into a hack and, despite Chris' cries for help, he was carried to the depot and placed on the cars. Several attempts were made on the way to Pennsylvania to take Chris from the bail, but were futile, and he was, by main force, delivered to the sheriff of Allegheny County, Pennsylvania.

Thereupon Chris sued out a writ of habeas corpus, alleging that he was a citizen of the state of Missouri, "that no legal proceedings, if any such, could have been had, were begun to warrant any such arrest in the state of Missouri, and that contrary to article 5 of the amendments to the constitution of the United States, he was deprived of his liberty without due process of law. The court said: "Of late years we have grown so accustomed to the proceedings by requisition that we have come to regard it as the only means by which a person can be removed from one state to another. An examination of the authorities, state and federal, shows, however, that, under certain circumstances, bail have the right to arrest their principals, wherever they find them, and remove them from the forum from which they have been released, and to which they have obligated themselves to surrender. By these authorities it would seem settled that when one is arrested, and bail is given, such principal is regarded as delivered to the custody of the bail; that the bail has a right to arrest or take the principal into

custody at any time or place in order to surrender him; that such arrest is not, by virtue of the process of the court, but is the exercise of a right arising from the relation between the parties; that the bail piece is not the authority for such arrest, but is simply evidence of the relationship between the parties. Such being the distinctions clearly drawn in the decisions, it will at once be seen that there is a fundamental difference between the right to arrest by bail and arrest under warrant, where such right to arrest is based upon a court process, which, *per se*, can have no extra jurisdictional power or efficacy." The arrest of the principal by the bail is based entirely upon the relationship fixed between the parties themselves, consequently, as between them, is confined to no locality or jurisdiction. A clear and concise statement of the authority of the bail to arrest, is found in the case of Worthen v. Prescott, 60 Vt. 72, 11 Atl. Rep. 690, where the court says: "The authority arises more from contract than from law; and as between the parties, neither the jurisdiction of the court nor of the state controls it; and so bail may take the principal in another jurisdiction or another state, on the ground that a valid contract made in one state is enforceable in another, according to the law there. This shows that the authority need not be exercised by process, but that it inheres in the bail themselves."

The Supreme Court of the United States, in Taylor v. Taintor, 16 Wall. 371, says: "When bail is given, the principal is regarded as delivered to the custody of his sureties. Their dominion is a continuance of the original imprisonment. * * * They may exercise their rights in person or by agent. * * * They may pursue him into another state; may arrest him on the Sabbath; and, if necessary, may break and enter into his house for that purpose. * * * The bail have their principal on a string, and may pull the string whenever they please and render him in their discharge. The rights of bail in civil and criminal cases are the same."

This is sufficient to present this interesting question in its various phases, and if any one desires to go further into the matter he will find much in the principal case as well as in Toles v. Adee, 84 N. Y. 222-240; Worthen v. Prescott, 60 Vt. 68.

NOTES OF IMPORTANT DECISIONS

COMMERCE—INTOXICATING LIQUORS—MUNICIPAL LICENSE—WILSON ACT.—Recently the supreme court of the United States had before it the question of whether or not a municipality may subject to a special license liquor brought in from another state and sold in the original package. The case was that of Philips v. City of Mobile, 28 Sup. Ct. Rep. 370. The case was originally brought in the city court of Mobile, where the finding of the court on an agreed statement of facts was against the city. An appeal was taken to the supreme court of the state of Alabama, which reversed the lower court, and remanded the case. From this judgment of the supreme court of Alabama, error was brought in the supreme court of the United States. In sustaining the Alabama court the supreme court of the United States speaks as follows:

"The sale of liquors is confessedly a subject of police regulation. Such sale may be absolutely prohibited, or the business may be controlled and regulated by the imposition of license taxes by which those only who obtain licenses are permitted to engage in it. Taxation is frequently the very best and most practical means of regulating this kind of business. The higher the license, it is sometimes said, the better the regulation, as the effect of a high license is to keep out from the business those who are undesirable, and to keep within reasonable limits the number of those who may engage in it. We regard the question in this case as covered in substance by prior decisions of this court." Citing Vance v. W. A. Vandercook Co., 170 U. S. 438, 446, 42 L. Ed. 1100, 1103, 18 Sup. Ct. Rep. 674; Reymann Brewing Co. v. Brister, 179 U. S. 445, 45 L. Ed. 269, 21 Sup. Ct. Rep. 201; Pabst Brewing Co. v. Crenshaw, 198 U. S. 17, 25, 49 L. Ed. 925, 928, 25 Sup. Ct. Rep. 552; Delamater v. South Dakota, 205 U. S. 93, 51 L. Ed. 724, 27 Sup. Ct. Rep. 447.

Continuing, the court says: "Even where the subject of transportation is not intoxicating liquor, this court has held that goods brought in the original packages from another state,

having arrived at their destination, and being at rest there, may be taxed, without discrimination, like other property within the state, even while in the original packages in which they were brought from another state." American Steel & Wire Co. v. Speed, 192 U. S. 500, 48 L. Ed. 538, 24 Sup. Ct. Rep. 365..

FOREIGN CORPORATIONS — PLEADING CAPACITY TO SUE — SUFFICIENCY OF COMPLAINT.—That a foreign corporation bringing suit in a state court other than that of its domicile, must allege among other things that it has obtained a license to do business within the state, where the laws of the state require it to obtain such a license, is held in Portland Company v. Hall & Grant Construction Company, 108 N. Y. Supp. 821. In that case a foreign corporation brought suit within the state of New York, and omitted to allege that the corporation had complied with the New York statute with regard to the licensing of foreign corporations. The court says: "It has been held that a complaint in an action brought by a foreign corporation to recover upon a contract made within this state, which fails to allege that the plaintiff has received a license to do business within this state, under Section 15 of the general corporation law, does not state a cause of action." Citing Wellsbach Co. v. Norwich Gas & Electric Co., 180 N. Y. 533, 72 N. E. Rep. 1152, wherein it was held that in an action by a foreign corporation to recover upon a contract made within the state of New York that if the complaint failed to allege compliance with said section it would be demurrable.

MAY A STATE IN THE EXERCISE OF THE POLICE POWER, PROHIBIT THE USE OF THE NATIONAL FLAG FOR ADVERTISING PURPOSES?

"Salus populi suprema lex." In this maxim of the law, perhaps more than in any other, is found the justification for the exercise of what is known as the "police power" of the state. No expression in the law is more difficult to define or limit than this expression, the police power. It is impractical, if not impossible, to definitely prescribe the limits of the police power by any general rule or definition.[1] As Chief Justice Shaw, the distinguished jurist, said in Commonwealth v. Alger:[2] "It is much easier to perceive and realize the existence and sources of the police power, than to mark its boundaries, or prescribe limits to its exercise."

In this article no attempt will be made to discuss this power in its many phases. The observation of Mr. Justice Bradley[3] at this point will give us as accurate a definition of this intangible power as can be found: "Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health and property of the citizens, and to the preservation of good order and the public morals."

It will be admitted by all that the state, in the exercise of its police power, may constitutionally enact laws calculated to promote the health,[4] comfort,[5] safety[6] and morals[7] of society. Courts differ as to what regulations are necessary to promote these things but in general agree that the police power properly extends to the regulation of certain professions such as dentistry[8] and plumbing,[9] the regulation of dairies,[10] cemeteries,[11] gas works,[12] smoke,[13] and

(1) Calif. Reduction Co. v. Sanitary Reduction Works, 126 Fed. Rep. 34.

(2) 7 Cush. (Mass.) 84.

(3) Boston Beer Co. v. Mass., 97 U. S. 25.

(4) Viemeister v. White, 179 N. Y. 235, 72 N. E. Rep. 97; Jacobson v. Mass., 197 U. S. 11, 49 L. Ed. 643; State v. Rabb (Me.), 60 Atl. Rep. 875.

(5) Glucose Refining Co. v. Chicago, 138 Fed. Rep. 209.

(6) Kibbe v. Stevenson, 136 Fed. Rep. 147.

(7) Mugler v. Kansas, 123 U. S. 623, 8 Sup. Ct. Rep. 273.

(8) State v. Chafman, 69 N. J. Law, 464, 55 Atl. Rep. 94; Ex parte Whitley (Calif.), 77 Pac. Rep. 879.

(9) State v. Justus, 90 Minn. 474, 97 N. W. Rep. 124.

(10) Fischer v. St. Louis, 194 U. S. 361.

(11) Odd Fellows Cemetery Assn. v. San Francisco, 140 Calif. 226, 73 Pac. Rep. 897.

(12) Dobbins v. Los Angeles, 139 Calif. 179, 72 Pac. Rep. 970.

(13) St. Paul v. Hangbro (Minn.), 100 N. W. Rep. 95.

weeds;[14] requiring the vaccination of children attending the public schools;[15] prohibiting the explosion of firecrackers;[16] prohibition of the sale or manufacture of intoxicating liquors within the state;[17] the regulation of pool rooms,[18] etc. Innumerable other instances of the exercise of the police power could be given, but to no purpose.

The interesting and important question now arises, may the state, in the exercise of the police power, prohibit the use of the national flag for advertising purposes? In various states of the Union[19] statutes have been enacted preventing and punishing the desecration of the flag of the United States. These statutes, among other things, make it a misdemeanor to sell, expose for sale, or have in possession for sale, any article of merchandise upon which shall have been printed or placed for purposes of advertisement, a representation of the flag of the United States. While over half of the states have enacted such statutes, it may be observed that congress has established no regulation as to the use of the flag, except that regulation contained in the Act of 1905, authorizing the registration of trademarks in commerce with foreign nations and among the states, "unless such mark consists of or comprises the flag or coat of arms, or other insignia of the United States or any simulation thereof."[20]

(14) State v. Boehm (Minn.), 100 N. W. Rep. 95; St. Louis v. Galt (Mo.), 77 S. W. Rep. 876.

(15) Viemeister v. White, supra; French v. Davidson (Calif.), 77 Pac. Rep. 663.

(16) City of Centralia v. Smith (Mo.), 77 S. W. Rep. 488.

(17) Mugler v. Kansas, supra; (and cases cited).

(18) City of Louisville v. Wehmoff (Ky.), 79 S. W. Rep. 201.

(19) Arizona, Colorado, Connecticut, California, Delaware, Idaho, Indiana, Illinois, Kansas, Maine, Massachusetts, Maryland, Michigan, Minnesota, Missouri, Montana, New Hampshire, New York, North Dakota, Nebraska, Ohio, Oregon, Rhode Island, Utah, Vermont, Wisconsin, Wyoming.

It will hardly be contended that the prohibition of the use of the national flag for advertising purposes is calculated to promote the health, comfort or safety of the general public. It is apparent, therefore, without discussion, that if this restriction or prohibition is within the police power of the state, then such power must be extended into a new field where it promotes patriotism by prohibiting such use of the flag.

Illinois and New York have held such prohibitive statutes unconstitutional. In Ruhstrat v. People of Illinois,[21] the Supreme Court in an able and exhaustive decision, holds that the police power does not extend this far, and that such a statute prohibiting the use of the national flag for advertising purposes is an interference with the constitutional privileges and immunities of citizens of the United States. This decision (1900) was without any direct precedent. The state contended that state enactments under the police power are supreme, unless there is a grant of exclusive authority to congress. It was further urged that the law being enacted under and by virtue of the police power of the state, the courts could not exercise a supervision over the wisdom and judgment of the legislature. These contentions, however, are manifestly unsound since the legislature does not have absolute power in the exercise of this police power. An act may be passed ostensibly in the promotion of public health, safety and morals, but it does not necessarily follow that such is always to be accepted as a legitimate and constitutional exercise of the police power. "Neither the legislature nor municipality can, under the guise of police regulations, arbitrarily invade private property or personal rights, and when such regulations are called in question, the test should be whether they have some relation to the public health or public safety and whether such is, in fact, the end sought to be attained."[22]

(20) 33 Stat. at Large 724, sec. 5, chap. 592, U. S. Comp. Stat. Supp., 1905, p. 670.

21) 49 L. R. A. 180 (Ill.).

Regarding the scope and limitations of the police power the Illinois court[23] holds as follows: "The police power is limited to enactments which have reference to the public health or comfort, the safety or welfare of society. Laws which impose penalites on persons, and interfere with the personal liberty of the citizen, cannot be constitutionally enacted, unless the public health, safety, comfort or welfare, demands their enactment. When the police power is exerted for the purpose of regulating a useful business or occupation, and the mode in which the business may be carried on or advertised, the legislature is not the exclusive judge as to what is a reasonable and just restraint upon the constitutional right of the citizen to pursue his calling. If, therefore, a statute, purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those subjects, or is a palpable invasion of right secured by the fundamental law, it is the duty of the courts to so adjudge and thereby give effect to the constitution."[24]

It is apparent, therefore, that all enactments passed under and by virtue of the police power of the state are not on that account valid. If such enactments are passed under the guise of protecting the public safety, morals, or health, but in reality invade constitutional rights of the citizen, it is the duty of the courts to declare them invalid. The question now arises, do these various flag laws[25] tend to promote the safety, morals, health or comfort of society? If so, they fall under the police power and are valid; if not, they are unconstitutional. New York and Illinois have held such enactments invalid; the United States Supreme Court and Nebraska have held such enactments to be a proper and legitimate exercise of the police power.

(22) Calif. Reduction Co. v. Sanitary Reduction Works, supra.

(23) Supra.

(24) Mugler v. Kansas, 123 U. S. 623, supra.

(25) Supra.

The Illinois court[26] holds that the police power does not extend so far as to prohibit the use of the national flag for advertising purposes. Justice Magruder, in the course of the decision, says: "It is difficult to see how the flag law of 1899 tends in any way to promote the safety, welfare or comfort of society. The use of a likeness of the flag upon a label or as a part of the trademark of a business man in the lawful prosecution of his business cannot be regarded otherwise than as an act which is harmless in itself. It may violate the ideas which some people have of sentiment and taste, but the propriety of an act considered merely from the standpoint of sentiment and taste, is a matter about which men of equal honesty and patriotism may differ."

Again the court says: "It is not clear that the prohibition leveled against the use or display of the flag tends in any way to elevate the morals or promote the welfare of the public. It is difficult to see why, if in the prosecution of foreign commerce or trade, the flag is used to protect a ship and cargo, and designate its character, it should be a desecration of the same flag to use a likeness of it upon a label or trademark in the prosecution of domestic trade or business." In the opinion the Illinois court further holds, that since congress has passed no legislation restricting the use of the flag, or confining its use to only particular purposes, that such restriction does not exist and cannot be enforced by the state, especially so since it does not promote the health, safety or morals of the people. The court in support of its conclusion, advances a strong reason, as follows: "The use of the flag of the United States, as embodied in advertising sheets, placards and labels, has received the unqualified approval of the whole commercial world. The usage and practice of employing a flag for commercial purposes have been indulged in by citizens of the United States with the knowledge of the national government. The absence of congressional legislation against the usage and practice thus indulged in, has

(26) Supra.

created a "privilege" in the citizen of the United States to continue such use until withdrawn by competent authority. A state enactment depriving the citizen of such privilege, contravenes that clause of the amendment to the national constitution, which forbids any state to abridge the privileges and immunities of a citizen of the United States." The court in the able and exhaustive opinion, concludes that the flag act is unconstitutional, not only as infringing upon the personal liberty guaranteed to the citizen by both the federal and state constitutions, but also as depriving a citizen of the United States of a right of exercising a privilege impliedly, if not expressly, granted to him by the federal constitution.

The New York court of appeals[27] holds such a statute invalid on another ground, namely, that it attempts to destroy an existing property right. The court did not discuss the general scope of the police power and whether such power justified the Flag Act, but contented itself by holding the act invalid since it applied to articles legally manufactured and already in existence. Parker, Ch. J., in an exceedingly short opinion, says: "It is settled in this state that a statute which attempts to destroy an existing property right is void. This statute destroys existing property rights; the legislature is powerless to effectuate such a result."

The next and last case decided in any state involving the unconstitutionality of the Flag Act, arose in Nebraska. In this Nebraska case[28] a criminal information was brought for violating the Flag statute[29] by using a representation of the flag of the United States as an advertisement on a bottle of beer. The Nebraska Supreme Court upholds the validity of the enactment and in an exhaustive and well reasoned opinion concludes that the statute may be justified in the exercise of the police power of the state. The conclusions and reasons of the court are interesting because they are diametrically opposed to the reasons advanced in the Illinois case.[30] In reply to the contention that where an act or course of action is not prohibited by the federal constitution, then the state cannot abridge such act, the court says: "If the fact that an act or course of action is not prohibited by the federal constitution gives a citizen of the United States a right which the state is powerless to abridge or restrict, the sphere of state legislation is more circumscribed than has been generally supposed, and our criminal code is largely waste paper. Nor can we agree that the federal government has the exclusive power to regulate the use of the national flag. It is not infrequent that the same act is an offense against both the state and federal governments. Counterfeiting furnishes an apt illustration. The power to punish for this offense is expressly given to congress, but the offense is also punishable under the laws of the federal states.[31]

Coming to the vital point, whether the police power justifies the Flag Act, the Nebraska court says: "The Illinois court held that the statute was not calculated to promote the health, comfort, safety and welfare of society. We find ourselves unable to agree with a court to whose opinions, ordinarily, we attach great weight. Patriotism has ever been regarded as the highest civic virtue and whatever tends to foster that virtue certainly makes for the common good. The flag is the emblem of national authority. To the citizen it is an object of patriotic adoration, emblematic of all for which his country stands—her institutions, her achievements, her long roster of heroic dead, the story of her past, the promise of her future; and it is not fitting that it should become associated in his mind with

(27) People ex rel. Pike v. Van De Carr, 178 N. Y. 425, 66 L. R. A. 189.

(28) Halter v. State, 105 N. W. Rep. 298.

(29) Supra.

(30) Supra.

(31) Fox v. State, 5 How. (U. S.) 416, 12 L. Ed. 213.

anything less exalted, nor that it should be put to any mean or ignoble use."

In the opinion the court offers what seems to be an ingenious and, to my mind, far fetched reason, when it says: "Moreover, that the citizen resents any improper use of the flag of his country, and that his resentment is frequently carried to the extent of a breach of the peace, are matters of common knowledge. The state has the undoubted right to legislate in the interest of the public peace. The act in question, is therefore justified as a valid exercise of the police power of the state." This certainly is questionable logic and is drawing a conclusion from rather doubtful premises.

In criticising the decision of the New York court[32] where the flag statute is held unconstitutional, because it interferes with existing property rights, the Nebraska court says: "By sweeping prohibitory legislation, those engaged in the manufacture and sale of intoxicating liquors were put out of business in the state of Kansas and property was rendered practically valueless. The United States Supreme Court[33] upheld the validity of such legislation."

The Nebraska court, therefore, holds that the police power may prohibit the use of the national flag for advertising purposes.

Whether or not the flag legislation may be justified under the exercise of the police power seems to have been finally settled by a recent decision of the Supreme Court of the United States.[34] The decision of the Nebraska court[35] is affirmed, with Mr. Justice Peckham dissenting. Mr. Justice Harlan, in upholding the constitutionality of the Nebraska flag enactment, says: "The importance of the questions of constitutional law raised will be recognized when it is remembered that more than half of the states of the union have enacted statutes[36] similar, in the general scope, to the Nebraska statute. That fact is one of such significance as to require us to pause before reaching the conclusion that a majority of the states have, in their legislation, violated the constitution of the United States." In commenting upon the general powers of the state to legislate, as to the limitations of such legislation, Justice Harlan says: "Except as restrained by its own fundamental law, or by the supreme law of the land, a state possesses all legislative power consistent with a republican form of government; therefore each state, when not thus restrained, and as far as this court is concerned, may, by legislation, provide not only for the health, morals and safety of its people, but for the common good, as involved in the well being, peace, happiness and prosperity of the people. Guided by these principles, it would seem difficult to hold that the statute of Nebraska, in forbidding the use of the flag of the United States for purposes of mere advertising, infringes any right protected by the constitution of the United States, or that it relates to a subject exclusively committed to the national government." In the course of the opinion, Mr. Justice Harlan traces the origin and history of the flag, and then says, relative to the regulation of its use as coming under the police power of the state: "Every American has an appreciation and a deep affection for the flag. Love, both of the common country and of the state, will diminish in proportion as respect for the flag is weakened. Therefore, a state will be wanting in care for the well-being of its people if it ignores the fact that they regard the flag as a symbol of their country's power and prestige, and will be impatient if any open respect is shown towards it. The use of the flag for purposes of trade and traffic, tend to degrade and cheapen it in the estimation of the people, as well as to defeat the object of maintaining it as an emblem of national power and national honor. And we cannot hold that any privilege of American citizenship, or that any right of personal

(32) Supra.

(33) Supra.

(34) Halter v. Nebraska (March, 1907), Adv. Sheets Sup. Ct. Rep., Vol. 27, No. 9, p. 419.

(35) Supra.

(36) Supra.

liberty is violated by a state enactment forbidding the flag to be used as an advertisement on a bottle of beer."

Further in the opinion the court holds that the legislature knew that the flag is the symbol of the nation's power. "It is not extravagant to say that to all lovers of the country it signifies government resting on the consent of the governed; liberty regulated by law; the protection of the weak against the strong; security against the exercise of arbitrary power; and absolute safety for free institutions against foreign aggression." The court then holds the statute valid, inasmuch as it was intended to cultivate a feeling of patriotism. Mr. Justice Harlan in this connection says: "It may reasonably be affirmed that a duty rests upon each state in every legal way to encourage its people to love the union, with which the state is indissolubly connected." In concluding the opinion, the court holds "It would be going very far to say that the statute in question had no reasonable connection with the common good and was not promotive of the peace, order and well being of the people. Before this court can hold the statute void it must say that, and in addition, adjudge that it violates rights secured by the constitution of the United States. We cannot so say and cannot so adjudge. We hold that the provision against the use of the flag for advertising articles of merchandise is not repugnant to the constitution of the United States."

This recent decision of the Supreme Court of the United States would, therefore, seem to give finality to this novel and interesting question.

Recapitulating, it may be observed, first, that the courts generally hold that enactments to promote the health, morals and safety of the public are valid as proper exercise of the police power of the state.

Second. Neither the legislature nor the municipality can, under the guise of police regulations, arbitrarily invade private property or personal rights.

Third. A state may, in the exercise of the police power, prohibit the use of the national flag for advertising purposes, such regulations being justified as promotive of the peace, order and well being of society.

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INSURANCE—RISKS—CHANGE OF LOCATION.

LATHERS v. MUTUAL FIRE INS. CO. OF TOWN OF LA PRAIRIE AND ADJOINING TOWNS.

Supreme Court of Wisconsin, April 17, 1908.

A policy of insurance covered a farm barn and live stock customarily kept therein against loss by fire; the live stock being described as "therein on the farm and from lightning at large." A horse that was on the farm at the time the policy was executed was subsequently taken temporarily to another farm, in which plaintiff had no interest, and while there was destroyed by fire. Held, that the policy covered the horse on the farm to which he was removed.

Where parties to a contract use language, the construction of which is well settled by law, they must be presumed to have used the language understandingly in the sense established by the construction given it by law.

Action to recover on an insurance policy.

The issues were tried by the court without a jury and, omitting formal matters, were thus in substance closed as to facts: September 15, 1904, defendant duly made and delivered to plaintiff an insurance policy covering the risk of loss by fire or lightning of the former's live stock, including a horse, the value of which it is sought to recover. The language of the policy as to the location of the live stock was in these words: "Live stock therein, on the farm and from lightning at large * * * all situated in the town of Turtle, county of Rock and State of Wisconsin on section 16." The horse was plaintiff's property from and before the time the insurance policy was issued till it was destroyed by fire and did not become encumbered after the application for insurance. He complied with all conditions of the insurance contract, and it was in force at the time of the loss. When the insurance was applied for and the policy was issued the horse was on plaintiff's farm in said section 16. June 20, 1906, the horse was destroyed by fire. At the time thereof it was on a farm some seven miles from plaintiff's farm. The fire did not occur from any of the risks ex-

cepted from those insured against. The horse was temporarily placed at the farm where it was destroyed to be broken, as was customary. At the time the policy was issued plaintiff was the owner of a large number of horses which he kept at his farm. That fact was well known to the president of the insurance company. In the section of the country where such farm was located, defendant transacted business and its officers resided there was a well established custom of placing young horses out to be broken. The horse was so placed for about three months, which was a reasonable time to accomplish the object thereof. Plaintiff had no interest in the farm where the horse was destroyed. The value of the horse at the time of the fire was $75. The loss was also insured against by another insurance company, the defendant having due notice thereof and consenting thereto. By reason thereof defendant is liable for one-half the value of the horse. Due notice of the loss, in compliance with the conditions of the policy, was given to the defendant.

The conclusions of law were to this effect: There was no warranty that the live stock should be kept on plaintiff's farm, nor was loss of the same while off the farm absolutely excepted from the risks insured against. The legal effect of the language of the policy is that the usual location of the live stock should be on the farm and that in case of a loss thereof by fire or lightning while temporarily and in the ordinary customary course of things absent therefrom it should be regarded as within the risks insured against. Plaintiff is entitled to recover one-half the value of the horse, to-wit: $37.50, with interest and costs. Judgment was rendered accordingly. Defendant appealed.

MARSHALL, J. (after stating the facts as above): Under the rules governing the subject, it is the opinion of the court, that no legitimate ground exists for disturbing the decision of the trial court in this case on the controverted matters of fact.

There is left to be determined this question of law: In case of insurance of a farm barn and of live stock customarily kept therein when not in use against loss by fire, the live stock being described as "therein on the farm and from lightning at large," is risk of loss of the stock by fire while, temporarily and according to custom, off the farm, included in the contract, there being no negative thereof expressly or by necessary inference, other than suggested by the words "therein, on the farm," etc.? The proposition is ruled in the affirmative, as respondent's counsel contend and the trial court decided, by Noyes v. Northwestern National Insurance Co., 64 Wis. 415, 25 N. W. Rep. 419, 54 Am. Rep. 631.

In the case referred to this court, while recognizing the existence of some conflict in the authorities, adopted the doctrine sustained, as it was thought, by the great weight of authority, that such language in a policy of insurance as that under consideration, unrestrained by other language, with reference to personal property which in the ordinary course of things is not kept constantly in a particular location should be held to have been used as merely descriptive of the subject of the insurance and its customary location, the dominant idea being insurance against risk of loss from specified causes; that such dominant idea should be regarded as having been intended to extend beyond the customary location of the property so as to include the ordinary incidental changes common thereto. The court referred to many cases involving insurance of live stock on farms and there are many others subsequently decided. Peterson v. Mississippi Valley Ins. Co., 24 Iowa, 494, 95 Am. Dec. 748; Mills v. Farmers' Ins. Co., 37 Iowa, 400; McCluer v. Girard Fire & Marine Ins. Co., 43 Iowa, 349, 22 Am. Rep. 249; Trade Insurance Co. v. Barracliff, 45 N. J. Law, 543, 46 Am. Rep. 792; Holbrook v. St. Paul Fire & Marine Ins. Co., 25 Minn. 229; American Central Insurance Co. v. Haws (Pa.), 11 Atl. Rep. 107; Haws v. Fire Association of Philadelphia, 114 Pa. Rep. 431, 7 Atl. Rep. 159.

The rule involved is one of construction. The idea is that the dominant purpose of the insurance being protection against loss from specified causes it could not be effectuated if the language of the policy restricted liability to loss occurring while the subject of the insurance remained in its customary location when not in use, incidental changes, as matter of common knowledge, being necessary to the enjoyment of the property in the ordinary way. So, under familiar rules, the absurd result that would happen in case of a strict construction or of treating the language as descriptive of the particular location of the property at the time of the happening of the loss is avoided by a free and liberal construction, the language being regarded as descriptive only of the subject of the insurance and of the general location thereof. In that way only, it is thought, could the mutual intention of the parties be effected. Obviously, as the fact is, the rule of construction applies only to such kinds of property as in the very nature of things does not and cannot without rendering the same substantially useless have a permanent location as in a particular building

or in a building at all. The rule is particularly applicable to horses because of the fact that use thereof for any purpose is commonly outside of a barn and because, on a farm, even when not in use they are commonly turned out to pasture.

The extent to which the rule under discussion has been carried in some jurisdictions goes much farther than is required for the purposes of this case, and perhaps than could be reasonably sustained. We refer to two illustrations, not at this time with approval, but to show how broadly the rule has been applied.

In American Central Ins. Co. v. Haws, supra, the language of the policy after the description of the property insured was this: "All contained in his new two-story frame barn, situated," etc. It was held to cover loss of a horse which was killed while at large in a pasture adjoining the barn, notwithstanding this language: "This policy shall be void and of no effect if the property be removed to any other building or location than that described therein."

In Machine Co. v. Insurance Co., 173 Pa. 53, 34 Atl. Rep. 16, patterns were insured against loss by fire. They were described as in the pattern shop. The undertaking was to insure the patterns "while located and contained as described herein, and not elsewhere," etc. The property was destroyed by fire while in use temporarily in a building near the pattern shop, which building was part of the manufacturing plant covered by the insurance. The pattern shop was not injured and had the patterns remained located therein the loss thereof would not have occurred. It was held that the policy covered the loss.

The law as above indicated and applicable to this case had been well settled in this state for more than twenty years before the insurance contract before us was made. Hence, if, as an original proposition, there could be any serious doubt as to its proper construction there cannot be under the circumstances. The parties must be presumed to have, understandingly, used the language they did in the broad sense which the established rule of construction suggests. Had it been desired to escape the effect of such rule, words might readily have been adopted to effect such desire. As the case stands the judgment is right and must be affirmed.

Judgment affirmed.

Note.—Change of Location of Thing Insured.—The words pointing out the present location of the thing insured are in law treated as descriptive unless the contract of insurance clearly and unequivocally provides otherwise. In this respect the rule is somewhat similar to the rule of construction in life insurance. The policy may insure the life of A. B. of Boston. The words "of Boston" would be merely descriptive of the person insured. Even though A. B. met his death in the heart of Africa, the insurer would be liable, unless the contract contained a clear, distinct and unequivocal limitation rendering the policy void under the extra hazards of African adventure.

In Peterson v. Mississippi Valley Ins. Co., 24 Iowa, 494, certain property was insured, among which were seven horses, situated in section 22. The assured, a farmer, while hauling his grain to market with two of the horses, put up for the night at a hotel, some distance away from section 22. During the night the barn in which the horses had been placed was destroyed by fire, and one of the insured horses burned to death. In that case the company was held liable, the risk being said to extend to the usual and ordinary use of the horses not only on section 22, but elsewhere.

In McCluer v. Girard F. & M. Ins. Co., 43 Iowa, 349, the policy covered a phaeton "contained in a frame barn," and while at a carriage shop undergoing repairs it was destroyed. The company held liable.

In Everett v. Continental Insurance Co., 21 Minn. 76, a threshing machine "stored in barn," etc., was insured. It was burned while standing in the field. In that decision it is said: "But whatever might have been the purpose of the location of the machine in the application and policy, there is no ground whatever for contending that it was, in letter or in spirit, a promissory stipulation on the part of the insured, or a condition of insurance on the part of the insurer, that this location should remain unchanged, or if changed, that while changed the insurance should cease or be suspended."

The doctrine of the principal case is thus well supported by authority, and is founded on one of the elements of contract, viz., intention of the parties.

JETSAM AND FLOTSAM.

VIRGINIA TITLES IN EASTERN KENTUCKY.

In the case of the Eastern Kentucky Coal Lands Corporation v. Commonwealth (Reported in 106 S. W. Rep. 260, January 22, 1908), wherein it was sought, by the above named corporation to assess, for taxation, 275,000 acres located in Pike county, Kentucky, under an Act of the Kentucky legislature passed in December, 1906, requiring all claimants of lands, to assess such lands by the first day of January, 1907, and to file a petition in the county court for leave to assess by the first day of March, 1907, the court, although no such question was before it, by any pleading in the case, held the law to be constitutional and valid, and in the next place, held the petition to assess insufficient, under this law because it failed to properly describe the land sought to be assessed. Under this decision, by the ordinary rule of pleading and practice, the presumption is, that if the pleader should go into the Pike County Circuit Court, and ask leave to file an amended petition, and should file a petition, containing a sufficient description of the land sought to be assessed, that this new filing would date back to the date of filing the original petition, and if

the petition was sufficient, there would be presented to the commonwealth, an issue for it to combat in such manner as it saw fit, consistent with its rights under the law.

In the history of legislation and judicial decisions, bearing upon this question of land titles in eastern Kentucky, it is admitted by the court that the titles granted by Virginia, to various parties, within the boundaries of Kentucky, prior to the time the latter became a state, were valid and gave such grantees title to the land, and it is also admitted, that such titles have never been affected, by any legislation Kentucky has enacted, and that matters stand just as they did when these two states entered into the Compact by which Kentucky became a state, except insofar as these Virginia grantees have lost title to portions of their land, by parties entering upon them, and occupying them within the terms of the Kentucky statutes of limitations. The inevitable conclusion is that such land as originally vested in the Virginia patentees by the Virginia patents and has not been so adversely occupied still remains in those Virginia patentees. So, to quite an extent, this decision does clear up the atmosphere, in regard to the titles to these lands. The Virginia patentees, are informed what land they own, and what they do not own, and this can be ascertained, by a survey of the entire original Virginia survey, and then surveying the holdings inside of it that have been occupied adversely for fifteen years, and subtract this from the amount of the original survey, and whatever is left, if any, belongs to the Virginia patentee. This may be expensive, but the court says that is no excuse and cannot be accepted. The petitioner to assess did not claim to be the owner of any of the improvements on any of the land sought to be assessed nor so much of the surface as had been adversely held for a period sufficient to toll petitioners right of entry. The petition averred that the petitioner was an owner, but of what part of an entire survey or in what proportion, and by whom the residue of the survey was owned, did not appear. The court said the land was not so described that it could be identified, and that it must be so described. The petitioner set out the entire survey as the land in which he held an interest, and left the court to find out where it was, in the survey.

The holding of the court is certainly based on the decisions. In Cooley on Taxation it is said. "The description in a deed must be one that identifies the land with reasonable certainty." Gooch v. Benge, 90 Ky. 393, 14 S. W. Rep. 375. In Tucker v. Carlson, 113 Iowa, 449, the court said, "a description in a tax deed of the northwest twenty-eight acres of the southwest fourth of the southwest fourth, is not a sufficient description of a tract comprising all of such forty acres, except a square acre in the northeast corner and an irregular tract in the southeast corner." In Roberts v. Deed, 57 Iowa, 329, the description was the "northwest part of the northeast fourth of the northeast fourth of Section 31, Township 74 east, range 8 west, containing three acres. The court said the description does not indicate the figure of the land. In Ferguson v. Huffman, 33 Ohio St. 395, a tax deed for 100 acres of 600 acres was held void. In the Underhill v. Kiers, 54 N. Y., App. Division, 214, the description "twenty-five acres out of a tract of 101 acres, on the north side and fronting on a highway, was held to convey no title. In Wales v. Spofford, 58 Texas, 115, the description was "One league and labor of land patented to P. Tesia, and known as Survey No. 412, situated in Kaufman county, Texas, about four miles northeast of the town of Kaufman, less the sum of 588 acres claimed by Thomas A. Bynum, and 1,531 acres claimed by Leon and H. Blum, out of said survey. It was held to convey no title.

The opinion of the court sustaining the demurrer to the petition to assess lands for taxation, on the ground of insufficient description of the land sought to be assessed, as stated in the opinion of the court, in its conclusion, was doubtless sound, and that question was before the court, by the demurrer to the petition, and that was the only question before the court. The filing of the petition admitted the constitutionality of the act of 1906, so far as the petitioner was concerned, and the commonwealth was interested in maintaining its constitutionality, and how, under any system of practice, the constitutionality of the act of 1906, could arise in the case, and the court hear argument, and render a long and exhaustive opinion on the constitutionality of law whose constitutionality was not questioned by any pleading in the case, was certainly an anomaly in practice. Issues are made up by pleadings in a case, and pleadings are filed for that purpose, and when a court goes outside of these issues and declares itself upon questions not properly before it such declarations of the court are not usually accepted as authority in other courts. They are treated as obiter, and as not decisive of anything that was not actually before the court, and as a rule, attorneys do not refer to them as authority. The most that can be made of such judicial utterances is, that what a court has said under such circumstances would probably be its opinion, if the question discussed was actually before the court. But the same court may not be there when the question does arise, and men of a different frame of mind may constitute the court, and for that reason only the decision of the question before the court has force with other courts.

The fact that during all the years the title to these lands has been in the Virginia patentees they have never contributed anything to the public revenue, save the small pittance they originally paid for their titles, while those who have occupied the lands, built their homes upon them, and otherwise improved them, presents a pathetic case for the moralist, only partially informed as to the facts, but the actual facts would seem to disclose two sides to the moral question in the case. In 1801 the legislature of Kentucky passed a law which was intended to forfeit all these titles to the state which were not listed for taxation by the first day of October, 1801. No doubt, many Virginia patentees believed this law was effective, and Kentucky strengthened this belief by granting Kentucky patents to lands that had not been properly listed. The law was declared unconstitutional in 1815 (Barbor v. Nelson, 1 Littell 60, and Robinson v. Huff, 3 Litt. 385). The law was amended in 1825 by simply inserting the words, "without inquest of office found," and this amended law was declared unconstitutional in 1876 Marshall v. McDaniel, 75 Ky. 365. Kentucky lowered the price of the land per acre in 1825 to ten cents per acre, to five cents in 1835, and two and one-half cents per acre in 1844 in 32 counties named in the act. Act of 1844. This fact must impress one that the Kentucky patentees were not large contributors to the public revenues, in the prices they originally paid for these lands. In

this respect they were perhaps on an equality with the Virginia patentees. The sliding scale of prices, from twenty cents per acre down to two and one-half cents per acre, which Kentucky adopted in the sale of these lands to the settlers, would indicate that the state had little faith in the title she was giving her grantees, and the constant reduction in the price appears to indicate her diminishing faith. It amounted to saying to these grantees, "we do not know what we are giving you, but we will give you what we seem to have at what it costs to make out the papers, and you can take your chances." They took such title as the state had to give, which the court now admits was a mere nullity, and for them the court now sounds the cry of hardship in being robbed of their homes, when the court itself admits that the foundation of the home she furnished these people was all sand.

The court, in its dissertation, gives us to understand the law passed in 1906 is an heroic attempt, on the part of the Kentucky legislature, to get rid of these Virginia grants, and do now, what everyone else sees, she ought to have done more than a hundred years ago, instead of permitting a matter of such grave import to run on as it has been running, until such vast interests have become involved. It is not an exalted judicial view the court takes in laying all the fault of this situation upon the Virginia patentees, when the clear inference from the court's own statement is that Kentucky might have changed this entire situation a hundred years ago just as well as now. The disinterested public will place the blame where it belongs, whether the court does or not.

It is history, and it is referred to in the recent opinion of the court of appeals, that there was hostility among the people residing in the district of Kentucky, to these Virginia titles, before Kentucky became a state, and the compact between Virginia and the proposed new state was demanded by Virginia for their protection, by reason of that hostility. And the early legislation of Kentucky affords ample evidence of the continuance and growth of this hostility on the part of Kentucky as a state, and it is not remarkable that this hostility was communicated to the people directly affected by this title question. It is also local history, within the memory of many yet living, that it has seldom been safe, from the early beginning of the state, for one of these Virginia titleholders to go into any of the eastern counties and assert title under one of these Virginia patents. At the first hearing of an application to assess these titles for taxation, at Prestonburg, in March, 1907, by the assignees of a large body of these lands, the public prints made the statement in all seriousness that one attorney representing settlers on these lands in Floyd county, advised his clients to come to the county seat, bring their Winchesters and stack them around the court house during the hearing of the case. And it was common remark that it was a brave and risky act for attorneys to come into that community and assert in the courts such a claim as they were making. Records of the federal court at Frankfort show that as far back as 1840 federal deputy marshals were shot at in eastern Kentucky from the brush while attempting to serve process in suits instituted by the late ex-Governor Robert Wickliffe, involving the Virginia title to some of these lands.

The conditions of these titles have all along been well known to many lawyers, and from time to time feeble attempts to assert title under these Virginia patents have been made in the federal courts. These suits have seldom reached farther than the first order of the court. These attempts were usually a suit in ejectment against all the parties occupying lands within a designated boundary or survey, and the first order of the court has been for the claimant in ejectment to bring in a survey of the land, including the smaller surveys claimed by settlers within the principal boundary. And it was generally a part of the order that if the surveyor was interfered with the fact should be reported to the court. Surveyors are still living who twenty years ago, when attempting to make a survey on Tug Fork of Big Sandy, under an order of the federal court at Louisville, were stoned by young boys when they would venture out of their quarters after dark. Many such instances as this could be enumerated, and they all detract from the weight of Judge O'Rear's moral discourse, which forms a large part of the judicial effusion, in the case now under consideration. To the average man life has been preferable to land, and although he might have a good claim to land under a Virginia title in eastern Kentucky, yet if it was likely to cost him his life to assert it, or he believed it would, he stayed away from Kentucky. Her "Night Riders" of the present day are merely another form of disregard for law that has prevailed in regard to these Virginia titles for more than one hundred years.

The learned judge, in his opinion, says 300,000 people are living within the district affected by these Virginia titles, and they are all interested in the settlement of this question. No doubt this is true, but this title question was there before any of the 300,000 were there, and if any of them were there as early as 1815, which is doubtful, they were then informed by a decision of the Kentucky court of appeals (Barbour v. Nelson, 1 Littell, 60), that this Virginia title question was still there, and had not been settled by anything the legislature or courts of Kentucky had done. The people affected by this title question were placed upon notice by the records of land offices, deed books and decisions of the courts, what the situation was in regard to these titles, and there was doubtless any amount of legal talent available to advise them as to their rights, and the risks they were taking. And so far as the Virginia title holders were concerned, in failing to assert their claims, it was not an ordinary case of "standing by," as understood in law, but, as we see on the facts hereinbefore stated, it was rather a case of "you Virginia claimants keep hands off, or mix in at your peril," and the moral of this land story is stripped of much of its pathos when the facts are sifted down and the truth brought to light. It is the case of one man owning the farm and another using and wearing it out, and the latter complaining of the former because he has not improved and paid taxes, when to attempt either meant violence, or worse.

Indianapolis. JOHN LAW.

THE CRIME OF PERJURY.

That the crime of perjury is much in evidence, and apparently on the increase, has been asserted and is probably correct. Articles many have been written on the subject in legal journals, calling attention to the evil. The bench declaims against it, but nothing is done. Suggestions are not wanting. One is, that if lawyers would discountenance false swearing on

the part of their own clients and ask for judicial protection when committed by their adversaries, the crime would at once grow less. Others say that justice should be meted out to false witnesses by summary action on the part of the presiding judge, one writer saying, "the perjurer would no more dare to come forward in our courts than in the English courts, if he knew that our trial judges were in the habit of committing perjurers on the spot, nor would any lawyer produce an obvious perjurer if he knew that to do so would mean his disbarment." He continues by saying that "the chief responsibility for perjury in the courts is with the trial judges themselves, because they have the power to stop it, and do not."

It is much easier to dilate upon an evil than to suggest a remedy, for the difficulties attendant upon this question are many, and need not at present be enlarged upon. Must it be left to the advancement of civilization and the supposed growing morality of the world in the future as to which it clearly must stand till the millenium; or are the judges to take a hand in running the risk of doing an occasional act of injustice for the benefit of the community? The law is clear enough, the application of it is the difficulty.

KANSAS WOMAN PROBATE JUDGE.

Governor Hoch has settled the Mitchell county probate fight by appointing Mrs. Levi Cooper to the job.

Mrs. Cooper is the widow of the late probate judge, who died about a week ago. During her husband's life she was deputy probate judge, and thoroughly understands the work of the office. When Mr. Cooper died, P. G. Chubbic and Cyrus Gaston applied for the place, and each one agreed to leave Mrs. Cooper in as judge pro tem.

"I got to thinking the matter over," said Governor Hoch, "and decided that if Mrs. Cooper was so valuable in the office there was no reason why she should not be appointed herself. So I have just decided to appoint her and settle the contest that way. So far as I know Mrs. Cooper is the first and only woman **probate judge in the state."—Topeka State** Journal.

BOOK REVIEWS.

AMERICAN DIGEST. ANNOTATED. 1907A.

This volume, as announced by the publishers, is, in reality, the beginning of a new series. It supplements the Decennial Digest, just as the Decennial supplements the Century. As will be remembered, the Century Digest covers all American case law, from the earliest time down to 1896. The Decennial Digest covers American case law from 1897 to 1900, and the present volume brings the series complete down to date of publication. The present series of which this volume is one, will be supplemented by monthly advance sheets, it being the desire of the publishers, to keep the profession in touch with the latest decisions of the courts. The titles and subdivisions are uniform with the titles and subdivisions of the earlier volumes. An improvement in the present volume is the insertion at the head of each topic of a full analysis of the topic. Published by West Pub. Co., St. Paul, Minn.

HUMOR OF THE LAW.

The lawyer of the defendant was trying to cross-examine a Swede who had been subpoenaed by the other side as a witness in an accident case.

"Now, Anderson, what do you do?" asked the lawyer.

"Sank you, Aw am not vera well."

"I didn't ask you how is your health, but what do you do."

"Oh, yes; Aw work."

"We knew that, but what kind of work do you do?"

"Puddy hard work; it ees purty hard work."

"Yes, but do you drive a team or do you work on a railroad, or do you handle a machine, or do you work in a factory?"

"Oh, yas; Aw work in fact'ry."

"Very good. What kind of a factory?"

"It ees a very big factory."

"Your honor,'" said the lawyer, addressing the court, "if this keeps on, I think we'll have to have an interpreter."

Then he turned to the witness:

"Look here, Anderson, what do you do in that factory—what do you make?" he asked.

"Oh, yes; Aw un'erstan'; you want to know vat Aw make'n fact'ry, eh?"

"Exactly. Now tell us what you make?"

"Von dollar an' a half a day."

And the interpreter was called in.—Philadelphia Ledger.

SAD TALE OF A MOTORIST.

There was a man of modest means,
But inclinations gay,
Who sold a corner lot and bought
A motor car one day.
He closed his business up to ride
Within the big machine,
And parted with his diamond ring
To buy the gasoline.

Before, along the country roads,
The sumac lit its fires,
He put a mortgage on his house
To purchase rubber tires;
And next he auctioned off his beds,
His tables and his chairs
To give the car a coat of paint
And make some slight repairs.

But speeding in the early dusk,
Without his lamps alight,
A man in blue and brass appeared
And stopped his dizzy flight.
He didn't have a single cent
To pay the fine imposed;
They took the auto for the debt,
And so the tale was closed.

—Popular Mechanics.

An Ohio lawyer tells of a client of his—a German farmer, a hard-working, plain, blunt man who lost his wife not long ago. The lawyer had sought him out to express his sympathy; but to his consternation the Teuton laconially observed:

"But I am again married."

"You don't tell me!" exlaimed the legal light, "Why, it has been but a week or two since you buried your wife!"

"Dot's so, my frent; but she is as dead as effer she vill be."—Lippincott's.

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. **Abstracts of Title**—Effect of Publication.—A compiler from public records and other sources of an abstract of title to lands held entitled to the exclusive use of the abstract until published.—Vernon Abstract Co. v. Waggoner Title Co., Tex., 107 S. W. Rep. 919.

2. **Acknowledgment**—Defective Acknowledgment.—An acknowledgment of a contract of sale of land, though defective, held not to render the contract invalid, since no acknowledgment is required on the execution of such a contract.—Campbell v. Hough, N. J., 68 Atl. Rep. 759.

3.——Married Women.—Acknowledgment of a deed by a married woman held not objectionable for failure to show that the deed was explained to her, or that she acknowledged it to the officer.—Best v. Kirkendall, Tex., 107 S. W. Rep. 932.

4. **Adjoining Landowners**—Lateral Support.—An owner making an excavation on his own land is not liable for injury to the adjacent land unless the excavation is negligently done, and if it is done with proper care, the owner of the adjacent land must protect the same from damage.—Gates v. Fulkerson, Mo., 107 S. W. Rep. 1032.

5. **Adverse Possession**—River as Boundary.—Where it is the custom to use a river as a barrier on the side of inclosures, a tract of land is sufficiently inclosed to give notice of an adverse holding if it is fenced on all sides except along such river.—Dunn v. Taylor, Tex., 107 S. W. Rep. 952.

6. **Animals**—Vicious Cow.—In an action against a corporation and its manager for injuries caused by a vicious cow, held that, plaintiff's pleading alleging the ownership of the animal in the corporation, they could not change their position on the trial so as to show ownership in somebody else.—Stevens v. Mrs. E. D. Burguieres Planting Co., La., 45 So. Rep. 601.

7. **Appeal and Error**—Appellate Jurisdiction.—On appeal to the county court by defendants, where the record does not show that an appeal bond or an affidavit was executed as required, the county court not having jurisdiction, a subsequent appeal from the county court does not give the court of civil appeals jurisdiction.—Maley v. Mundy, Tex., 107 S. W. Rep. 905.

8.——Harmless Error.—A misstatement in the charge as to a wholly unimportant fact is not ground for reversal, especially where the attention of the court was not called to the same when made.—Pennsylvania R. Co. v. Donora Southern R. Co., Pa., 68 Atl. Rep. 845.

9.——Legal Issues in Equity Action.—Where a legal issue in an equity suit was tried to a jury, and the verdict was sustained both by the law judge and the chancellor, it would not be set aside on appeal, unless substantial error to the prejudice of the defeated party was committed in the trial thereof.—Modawick v. Martineck's Guardian, Ky., 107 S. W. Rep. 759.

10.——Rulings on Demurrer. — The supreme court cannot consider demurrers where the record does not disclose any action by the court thereon.—Reeves v. Anniston Knitting Mills, Ala., 45 So. Rep. 702.

11.——Rulings on Pleading.—The sustaining of a demurrer to paragraphs of the answer was without prejudice where such paragraphs professed to answer paragraphs of the complaint eliminated by demurrer.—Polk v. State, Ala., 45 So. Rep. 652.

12.——Sufficiency of Evidence.—Where an issue was submitted without any question by plaintiffs, whether there was any evidence to support it, the object was thereby waived, and was not transferred on appeal by a general exception to defendant's verdict.—Tilton v. Tilton, N. H., 68 Atl. Rep. 867.

13. **Appearance**—Appearance after Decree.—A petition by a defendant against whom a decree for divorce had been granted attacking the validity of the decree for lack of jurisdiction, and praying for the vacation thereof and for other relief, held not a general appearance sufficient to confer jurisdiction on the court.—McGuinness v. McGuinness, N. J., 68 Atl. Rep. 768.

14. **Assault and Battery**—Criminal Liability.—In a prosecution for assault, where a count charged an assault with a weapon, to wit, a gun or pistol, a charge which failed to state the character of the assault necessary to be proved under such count was erroneous.—Crenshaw v. State, Ala., 45 So. Rep. 631.

15.——Pleadings.—In an action for an assault and battery, where self-defense is set up, the burden of showing freedom from fault on the part of defendant in bringing on the difficulty is not on defendant.—Morris v. McClellan, Ala., 45 So. Rep. 641.

16. **Assumpsit, Action of**—Recovery on Common Counts.—To authorize the transferee of nontransferable checks issued by an employer to recover under the common counts, it must be shown that he bought the checks at the instance or request of the employer.—Kanjutzky v. Tennessee Coal, Iron & R. Co., Ala., 45 So. Rep. 676.

17. **Bankruptcy** — Composition. — Bankr. Act c. 541, sec. 12d, requires the judge to be satisfied that a composition is for the best interest of the creditors before confirming it, but its acceptance by a majority of them is prima facie evidence of such fact, and the burden rests upon objecting creditors to show a gross discrepancy between the amount offered and the amount to be reasonably expected from a sale

of the assets to justify a refusal to confirm.—In re Waynesboro Drug Co., U. S. D. C., S. D. Ga., 157 Fed. Rep. 101.

18.——Conflicting Jurisdiction.—An attempt by the assignee of a dividend in a bankruptcy court to invoke the trustee process of a state court is an interference with the exercise of a paramount federal authority and an obstruction of the administration of the bankrupt estate.—Rockland Sav. Bank v. Alden, Maine, 68 Atl. Rep. 863.

19.——Petition to Reclaim Property.—A petition to a court of bankruptcy to reclaim property which was in the bankrupt's possession, but which the petitioner claims to own, need not describe the property with the degree of definiteness and particularity required in a complaint in replevin.—In re Pierce, U. S. C. C. of App., Eighth Circuit, 157 Fed. Rep. 757.

20. **Banks and Banking**—Insolvency.—Where a large part of the assets of an insolvent banking corporation consists of obligations of subsidiary companies and firms formed by its officers and largely financed by it, an officer and director who, although not an active participant of such transactions, was cognizant of and consented to them, should not be appointed or continued as its receiver.—Coy v. Title Guarantee & Trust Co., U. S. C. C., D. Oreg., 157 Fed. Rep. 794.

21. **Benefit Societies**—Recovery of Money Paid.—One held not entitled to recover money paid as money had and received notwithstanding a mistake of law, the consideration being indivisible and there not having been a total failure of consideration.—Southern Mut. Aid Ass'n v. Watson, Ala., 45 So. Rep. 649.

22. **Bills and Notes**—Bona Fide Purchasers.—Where a corporation issues commercial paper when not authorized to issue any commercial paper, such paper is void even in the hands of a bona fide purchaser for value before maturity.—Stouffer v. Smith-Davis Hardware Co., Ala., 45 So. Rep. 621.

23. **Brokers**—Commissions.—A real estate agent, whose authority to sell is first put in writing in a contract for sale between the vendor and vendee, which is not under seal, cannot recover commissions.—Alpern v. Klein, N. J., 68 Atl. Rep. 799.

24.——Commissions.—That a partner of the purchaser produced by a real estate agent attempted to buy direct of the owner, who refused to sell, should not deprive the agent of his commission where he had no knowledge thereof, and acted in good faith.—Hartford v. McGillicuddy, Me., 68 Atl. Rep. 860.

25. **Carriers**—Change in Nature of Liability.—After a consignment is ready for delivery, the custody of the common carrier will not cease and become that of a warehouseman, until the lapse of a reasonable time in which to accept the shipment.—Central of Georgia Ry. Co. v. A. F. Merrill & Co., Ala., 45 So. Rep. 628.

26.——Negligence.—A passenger taking a train may rely on the duty of the railroad company to keep the track clear between train and station.—Harper v. Pittsburg, C., C. & St. L. R. Co., Pa., 68 Atl. Rep. 831.

27.——Wrongful Ejection of Passenger.—If a passenger is drunk and boisterous or annoys other passengers, or if he fails to deliver his ticket to the conductor or refuses to pay his fare, the conductor may eject him from the train, using no more force than is necessary for that purpose.—Chesapeake & O. Ry. Co. v. Robinette, Ky., 107 S. W. Rep. 763.

28. **Certiorari**—Private Prosecutors.—Power to make and effect of making others than the municipality parties to certiorari to review municipal proceedings stated.—Specht v. Central Passenger Co., N. J., 68 Atl. Rep. 783.

29. **Commerce**—Taxation.—For property of a foreign corporation to be exempt from taxation under the commerce clause of the federal constitution, there must be a continuous movement of merchandise in interstate commerce.—Lehigh & Wilkes-Barre Coal Co. v. Borough of Junction, N. J., 68 Atl. Rep. 806.

30. **Conspiracy**—Evidence to Establish.—A conspiracy to commit a crime may be and usually must be, from the nature of the case, proved by inference from the acts of the parties and their co-operation.—Smith v. United States, U. S. C. C. of App., Eighth Circuit, 157 Fed. Rep. 721.

31. **Constitutional Law**—Construction of Provisions.—The rule that, as exceptions strengthen the force of the general law, so enumeration weakens as to things not eumerated, applies to the provisions of the constitution.—Western Union Telegraph Co. v. Railroad Commission of Louisville, Ky., 45 So. Rep. 598.

32.——Criminal Prosecutions.—Loc. Laws 1894-5, p. 425, sec. 1, amending Laws 1890-91, pp. 561, 562, secs. 4, 10, relating to drawing jurors from the territory within two miles of the courthouse in Jefferson county in capital cases, held not a violation of Const. 1901, art. 1, sec. 6, requiring trial by a jury of the county or district in which the offense was committed.—Wray v. State, Ala., 45 So. Rep. 697.

33.——Legislative Powers.—The legislature has no power to exempt any particular person or corporation from the operation of the general laws, or to impose special conditions on rights of action against a corporation.—Milton v. Bangor Ry. & Electric Co., Me., 68 Atl. Rep. 826.

34.——Obligation of Contracts.—The provision in the charter of the Camp Meeting Association of the Newark Conference (P. L. 1869, p. 484) exempting its property from taxation was a mere gratuity, and did not constitute an irrepealable contract.—Hanover Tp. v. Camp Meeting Ass'n of Newark Conference, N. J., 68 Atl. Rep. 753.

35. **Corporations**—Interstate Commerce.—A decision of the supreme court of the United States on the question of the power of states to regulate interstate commerce by requiring the stopping of trains is binding on the state courts.—St. Louis, I. M. & S. Ry. Co. v. State, Ark., 107 S. W. Rep. 989.

36.——Receivers.— Generally speaking an officer or director of an insolvent corporation should not be appointed receiver for its property, especially where he has contributed to its mismanagement.—Coy v. Title Guarantee & Trust Co., U. S. C. C., D. Oreg., 157 Fed. Rep. 794.

37.——Ultra Vires Contracts.—Where the business of a corporation which it is required to transact is lawful, there is no presumption that a contract made in pursuance to such business is ultra vires.—Edwards v. National Window Glass Jobbers' Ass'n, N. J., 68 Atl. Rep. 800.

38.——What Law Governs.—Where a corporation sought to cancel certain stock issued to its president, under a contract both illegal and inherently fraudulent, the corporation as a condition to such relief was not required to render compensation to the president for his services as such.—Central Consumers' Wine & Liquor Co. v. Madden, N. J., 68 Atl. Rep. 777.

39. **Criminal Evidence**—Confronting Opposing Witness.—Permitting a witness for the state to answer a certain question after announcing that the witness was so dangerously ill that to examine him would be inhuman, etc., held a denial of an accused's right to be confronted by opposing witnesses, and a refusal to exclude the answer held error.—Wray v. State, Ala., 45 So. Rep. 697.

40.——Matters of Opinion.—In a prosecution for homicide, defendant having offered in evidence the showing for a certain witness, it was competent to show by persons acquainted with the names of the residents of the community that no such person lived in the community.—Walker v. State, Ala., 45 So. Rep. 640.

41.——Res Gestae.—To authorize the admission of a declaration by deceased after he was shot as res gestae, it must be shown to have stood in such immediate causal relation to the shooting as to have been an emanation thereof.—Baker v. State, Ark., 107 S. W. Rep. 983.

42. **Criminal Law**—Self Defense.—An instruction that if defendant was the aggressor in the first instance, yet his right of self-defense in the house would be revived, provided he had abandoned the difficulty, held favorable to defendant, and not on the weight of the evidence.—Davis v. State, Tex., 107 S. W. Rep. 851.

43. **Criminal Trial**—Argumentative Instructions.—A charge that, before accused can be convicted, the evidence must be such as would cause a reasonable and prudent man to hesitate and pause in the graver transactions of life, is properly refused as argumentative.—Lacy v. State, Ala., 45 So. Rep. 680.

44.——Giving Instructions.—Where instructions were indorsed "Given," and handed to the jury, defendant, not having requested that they be read to the jury until the jury had left the box, was not entitled to an exception to the court's refusal to read them to the jury.—Boyd v. State, Ala., 45 So. Rep. 634.

45.——Jurisdiction.—Though one accused of an offense may demand a trial in the county where the offense was committed, the legislature may empower the courts of a village in one county to try offenders against the village ordinances committed in an adjoining county.—Town of Gower v. Agee, Mo., 107 S. W. Rep. 999.

46.——Request to Charge.—Where a request to charge used the word "defendant" where the name of the assaulted party was intended, the charge was fatally defective, and, if otherwise good, was properly refused.—Moore v. State, Ala., 45 So. Rep. 656.

47. **Damages**—Deeds.—A good general grant will not be limited by a subsequent particular description, unless an intention definitely appears from the terms of the particular description to limit the general grant.—Barksdale v. Barksdale, Miss., 45 So. Rep. 615.

48.——Excessive Verdict.—In an action against a sleeping car company for failing to inform a passenger of the arrival at her destination, a verdict allowing her $1,000 compensatory and $500 punitive damages held excessive.—Pullman Co. v. Lutz, Ala., 45 So. Rep. 675.

49.——Measure of Damages.—Where a building sold for removal is burned by the seller's negligence, the measure of damages is not necessarily the purchase money paid, but the value of the building as it stood on the land is the standard.—Tighe v. Atchison, T. & S. F. Ry. Co., Mo., 107 S. W. Rep. 1034.

50.——Mental Suffering.—The mere desire and intention to attend a theatrical performance, a dance, a concert or other such amusement held not to involve any such sentiments or emotions as to allow recovery for mental anguish in suits for breach of contract in refusing admission to such amusements after the purchase of tickets.—Buenzle v. Newport Amusement Ass'n, R. I., 68 Atl. Rep. 721.

51.——Mental Suffering.—In an action by a parent for negligent injury to a minor, he may recover only compensatory damages, not including recovery for mental suffering by himself.—Reeves v. Anniston Knitting Mills, Ala., 45 So. Rep. 702.

52. **Descent and Distribution**—Action by Distributees.—In a suit by next of kin to enjoin the disposition of personalty, evidence held to show the personalty belonged to decedent, and not to defendant.—Buchanan v. Buchanan, N. J., 68 Atl. Rep. 780.

53. **Disturbance of Public Assemblage**—Religious Worship.—In a prosecution for disturbing religious worship consisting of a Christmas tree celebration, evidence that preacher when announcing the celebration stated that he expected to be present held admissible.—Stafford v. State, Ala., 45 So. Rep. 673.

54. **Estoppel**—Denial of Liability.—An employer issuing non-transferable checks to its employees held not estopped from denying a transferee's right to recover on them.—Kanjutzky v. Tennessee Coal, Iron & R. Co., Ala., 45 So. Rep. 676.

55. **Evidence**—Documentary.—The signing of a note by the maker having been proved, it was properly admitted in evidence in an action against him thereon.—Clayton v. Ingram, Tex., 107 S. W. Rep. 880.

56.——Expert Testimony.—In an action for damages for personal injuries, if a physician can form no opinion of plaintiff's present state, without considering the history of the case and prior symptoms as related by plaintiff, his opinion is incompetent.—Gibler v. Quincy, O. & K. C. R. Co., Mo., 107 S. W. Rep. 1021.

57.——Expert Testimony.—An expert should not give his opinion from his reading of depositions containing evidence subject to different interpretations by different witnesses.—Tighe v. Atchison, T. & S. F. Ry. Co, Mo., 107 S. W. Rep. 1034.

58.——Judicial Notice.—Courts will take judicial notice of the appointment and tenure of office of a member of the President's cabinet.—Frederick v. Goodbee, La., 45 So. Rep. 606.

59.——Lost Will.—To sustain the burden of proof in proving the existence and contents of a lost will or proving an agreement to bequeath by will or mutual mistake, the evidence must be clear and convincing, and such as to satisfy the mind of the court.—Liberty v. Haines, Me., 68 Atl. Rep. 738.

60. **Executors and Administrators**—Contract to Sell Land.—An administratrix's contract to sell land under an order from the orphans' court may be specifically enforced; and the heirs of decedent are not necessary nor proper parties to such suit.—Campbell v. Hough, N. J., 68 Atl. Rep. 759.

61.——Homestead.—Where testator devised a homestead to his wife for life, remainder to grandchildren, held, in determining whether the testator's intention was that the entire homestead be sold to satisfy his debts, or only the

remainder interest, the situation and relationship of the parties and the terms of the will would be considered.—Marx v. Haley, Miss., 45 So. Rep. 612.

62. **Federal Courts**—Validity of State Statute.—The only remedy to correct a decision of the highest court of a state in chancery cases, as well as in actions at law, is by a writ of error to the supreme court of the United States. —Chicago, R. I. & P. Ry. Co. v. Swanger, U. S. C. C., N. D. Mo., 157 Fed. Rep. 783.

63. **Fines**—Involuntary Servitude.—A contract made under Code 1896, sec. 4751, binding a person convicted of a misdemeanor to work for his surety until the fines and costs are paid above the money advanced for his living expenses held void as exacting involuntary servitude for debt.—Elston v. State, Ala., 45 So. Rep. 667.

64. **Fixtures**—Henhouse.—A henhouse erected on another's land with the privilege of removal remains the property of the builder.—Pile v. Holloway, Mo., 107 S. W. Rep. 1043.

65. **Fraud**—Presumptions.—Though fraud is not presumed and must be proved, it may be deduced from circumstances and conditions which afford strong presumptions of its existence.—Buchanan v. Buchanan, N. J., 68 Atl. Rep. 780.

66. **Frauds, Statute of**—Sale of Real Estate. —The statute of frauds is satisfied by the signature of an agent to an agreement to convey lands, if the agent has express authority to bind the principal by writing, which authority may be shown by parol.—Campbell v. Hough, N. J., 68 Atl. Rep. 759.

67. **Fraudulent Conveyances**—Evidence.—Evidence that, before the execution of a chattel mortgage, the mortgagee had made an oral promise to pay the mortgagor's debts, held incompetent for the purpose of proving that the mortgage was fraudulent as to creditors.—Beeler v. Perry, Mo., 107 S. W. Rep. 1008.

68. **Guardian and Ward**—Parol Exchange of Land.—Parol exchange of land by mother and infant daughter with consent of guardian held invalid against the estate of the daughter, who died before she became of age.—Sayers v. Pollock, Pa., 68 Atl. Rep. 772.

69. **Homicide**—Dying Declarations.—Dying declarations of the victim are only admissible in a prosecution for homicide when the declarant had given up all hope of recovery at the time they were made.—Johnson v. Commonwealth, Ky., 107 S. W. Rep. 768.

70.——Malice.—The law presumes malice from the use of a deadly weapon, and casts on defendant the burden of repealing the presumption, unless the evidence proving the guilt shows an absence of malice.—Burkett v. State, Ala., 45 So. Rep. 682.

71.——Requisites of Indictment.—An indictment for shooting into a wagon filled with several persons, and shooting D., should charge that accused shot into a wagon wherein was D. and divers others with felonious intent of killing some one or more of them, and, in fact, shot D.—Gentry v. State, Miss., 45 So. Rep. 721.

72.——Self-Defense.—It was not error to fail to define manslaughter or submit aggravated assault, where defendant, convicted of assault with intent to murder, under his own statement shot in self-defense.—Moore v. State, Tex., 107 S. W. Rep. 833.

73. **Husband and Wife**—Injuries.—The right to compensation for the wrongful injury to a wife's ability to perform labor beyond that pertaining to the care of the household and family belongs to the wife, and not to the husband.— Kirkpatrick v. Metropolitan St. Ry. Co., Mo., 107 S. W. Rep. 1025.

74.——Rights of Survivor.—A widow held entitled to sue in her own name for damages and reformation of a deed made to herself and husband prior to his decease, in exchange for land belonging to them, her husband having only a life estate in the land so conveyed to them.— Gregory v. Copeland, Ky., 107 S. W. Rep. 768.

75. **Infants**—Contracts.—In a suit on a note against a minor, evidence considered, and held sufficient to sustain a verdict for plaintiff on the issue of fraud and minority set up by defendant.—Clayton v. Ingram, Tex., 107 S. W. Rep. 880.

76. **Injunction**—Affidavits.—The cross-examination of one whose affidavit accompanies the bill, or is presented by defendant in a cause in which an injunction is prayed, taken under court of chancery rule 124a, is held available to the adverse party, though the party procuring and conducting the cross-examination sees fit not to use it.—Campbell v. Hough, N. J., 68 Atl. Rep. 759.

77.——Preliminary Injunction.—Where, in an injunction suit, the affidavit to the bill was defective, such defect should have been pointed out at the proper time, and defendant may not rely thereon to cure a defective affidavit to his answer.—Empire Guano Co. v. Jefferson Fertilizer Co., Ala., 45 So. Rep. 657.

78. **Innkeepers**—Negligent Operation of Elevator.—The proprietor of a hotel operating a passenger elevator therein must exercise at least ordinary care as to every person having lawful business on the premises.—McCrocken v. Meyers, N. J., 68 Atl. Rep. 805.

79. **Intoxicating Liquors**—Local Option.—A local option election held only for a part of the territory originally adopting local option, being on that account void ab initio, need not be held valid until contested by competent authority, and its invalidity may be determined in a collateral proceeding.—Oxley v. Allen, Tex., 107 S. W. Rep. 945.

80.——Unlawful Sale.—That defendant was subpoenaed to produce "his" internal revenue license, and did not do so, did not authorize one who had examined the internal revenue collector's books to testify concerning a license issued to another.—Biddy v. State, Tex., 107 S. W. Rep. 814.

81. **Judgment**—Lien.—To establish the existence of a judgment lien, the burden is upon the lienor to prove the issue of an execution on his judgment within twelve months after its rendition, as expressly required by Sayles' Rev. Civ. St. 1897, art. 3293.—Bourn v. Robinson, Tex., 107 S. W. Rep. 873.

82. **Jury**—Exclusion of Negroes.—Discrimination against negroes in selection of a jury list held to violate the sixth amendment to the constitution of the United States, guaranteeing to an accused in a criminal prosecution a trial by an impartial jury.—Farrow v. State, Miss., 45 So. Rep. 619.

83.——Juror Witness in Same Cause.—While the fact that a juror has been summoned as a witness in a case is good ground for challenge for cause, it is reversible error for the trial court, of its own motion, to exclude a juror on such ground against the objection of defendant. —Walker v. State, Ala., 45 So. Rep. 640.

84. **Justices of the Peace**—Jurisdiction.—An

action against a carrier for breach of contract for the carriage and delivery of goods may be in form either ex contractu or ex delicto, and in either form a justice of the peace has jurisdiction.—St. Louis & N. A. R. Co. v. Wilson, Ark., 107 S. W. Rep. 978.

85. **Larceny**—Possession by Owner.—Defendant held not entitled to an acquittal of larceny on the theory the property was not in defendant's possession when stolen.—Crouch v. State, Tex., 107 S. W. Rep. 859.

86. **Libel and Slander**—Malice.—What would otherwise be a privileged or qualifiedly privileged communication is not so where the publisher is actuated by malice.—Stewart v. Codrington, Fla., 45 So. Rep. 809.

87. **Literary Property**—Compilation from Public Records.—A compiler from public records and other sources of an abstract of title to lands held entitled to the exclusive use of the abstract until published.—Vernon Abstract Co. v. Waggoner Title Co., Tex., 107 S. W. Rep. 919.

88. **Logs and Logging**—Enforcement of Lien.—Where the true mark on logs is correctly given in the writ in an action to enforce a logging lien, the mark itself identifies the logs, and the name given to the mark in the writ is immaterial.—Brogan v. McEachern, Me., 60 Atl. Rep. 822.

89.——Performance of Contract.—The owner of land who sold certain timber thereon, to be removed in a reasonable time, but prevented its removal by threats and intimidation, held estopped to assert that it was not removed within the time agreed.—Hurst v. Taylor, Ky., 107 S. W. Rep. 743.

90. **Malicious Prosecution**—Contempt Proceedings.—Person adjudicated in contempt and discharged on payment of costs cannot maintain action for malicious prosecution against petitioner in contempt proceedings.—Hoskins v. Somerset Coal Co., Pa., 68 Atl. Rep. 843.

91.——Probable Cause.—Where advice of an attorney was obtained in good faith, though the person accused may succeed in proving his innocence, the parties cannot be held to have acted through malice.—Kirk v. Wiener Loeb Laundry Co., La., 45 So. Rep. 738.

92. **Mandamus**—Hearing on Agreed Case.—Mandamus will not lie to compel a judge to proceed with an agreed case before hearing a suit to cancel the agreement to submit the case, as his action may be reviewed by appeal or error.—State v. McCune, Mo., 107 S. W. Rep. 1030.

93. **Maritime Liens**—Master's Authority to Pledge Credit.—A master's authority to pledge the credit of his ship is limited by the rule of necessity, and whoever extends to him credit beyond what is reasonably necessary in the prudent management of the vessel acquires no lien therefor.—The Charles E. Falk, U. S. D. C., N. D. Wash., 157 Fed. Rep. 780.

94. **Master and Servant**—Assumed Risk.—Where a servant knew of a defect in the appliances, or it was plainly observable, if he appreciated that it was dangerous, he assumed the risk.—American Smelting & Refining Co. v. McGee, U. S. C. C. of App., Eighth Circuit, 157 Fed. Rep. 69.

95.——Assumed Risk.—Employee of a railroad company obeying an order of the conductor in charge of a train, commanding him to go into a place of apparent extra hazard, will do so at his own risk.—Atlantic Coast Line R. Co. v. Beazley, Fla., 45 So. Rep. 761.

96.——Assumption of Risk.—An employee of a railroad company whose duties required him to pass through defendant's railroad yards held not to have assumed the risk of being struck by cars.—Missouri, K. & T. Ry. Co. of Texas v. Balliet, Tex., 107 S. W. Rep. 906.

97.——Contributory Negligence.—Defendant in an action for personal injuries is entitled to a requested charge grouping the facts relied on as constituting plaintiff's contributory negligence, even though the plea is not as specific as the testimony relating thereto.—Galveston, H. & S. A. Ry. Co. v. Worth, Tex., 107 S. W. Rep. 958.

98.——Leases.—That about the time complainant leased a fruit stand he formed a partnership does not defeat his right to recovery individually for breach of the lessor's covenants; there being no proof of an assignment of the lease to the partnership.—Metzger v. Brincat, Ala., 45 So. Rep. 633.

99.——Personal Injuries.—Where premises about which a servant is employed are known by him to be defective, but the danger is not apparent and he has no knowledge thereof, he does not assume the risk.—Marshall v. St. Louis Southwestern Ry. Co. of Texas, Tex., 107 S. W. Rep. 883.

100.——Risks Assumed by Servant.—The risks assumed by the servant as part of his contract of employment are those which naturally and incidentally belong to the business as long as it is conducted by the master within the limits of reasonable care.—Huston v. Quincy, O. & K. C. R. Co., Mo., 107 S. W. Rep. 1045.

101. **Monopolies**—Restraint of Trade.—Allegations of an answer setting up Act Jan. 23, 1905 (Acts 1905, p. 1), imposing certain penalties upon trusts, monopolies, etc., doing business within the state, held not to amount to an averment that plaintiffs were transacting business within the state when goods were sold.—Frank A. Menne Factory v. Harback Bros., Ark., 107 S. W. Rep. 991.

102. **Municipal Corporations**—Charter Powers.—Powers delegated to municipalities by the legislature are intended to be exercised in conformity to and consistent with the general laws of the state.—Crittenden v. Town of Booneville, Miss., 45 So. Rep. 723.

103.——Defective Sidewalks.—A man with poor eyes, with a basket of vegetables on his head, has a right to assume within reasonable limits that, if sidewalks have been made unsafe, those who have made them so will warn him of the fact.—Rock v. American Const. Co., La., 45 So. Rep. 741.

104.——Demolition of Buildings.—A municipal corporation held prima facie liable for the unlawful demolition of a private building by direction of its board of trustees.—Faucheux v. Town of St. Martinville, La., 45 So. Rep. 600.

105.——Extra-Territorial Jurisdiction.—An ordinance affecting dramshops within one-half mile of the village limits adopted under Rev. St. 1899, sec. 6010 (Ann. St. 1906, p. 3034) held a valid police regulation as to persons residing within the half-mile limit, but in another county, and not unreasonable as to such persons as an extra-territorial revenue measure.—Town of Gower v. Agee, Mo., 107 S. W. Rep. 999.

106.——Retrospective Taxation.—Property previously omitted from municipal taxation may be restrospectively assessed, though the taxpayer, at the time the omitted property should have been assessed, listed all the property with the assessor which the assessor deemed subject

to assessment.—Hogan v. City of Louisville, Ky., 107 S. W. Rep. 809.

107. **Nuisance**—Pipe Lines.—Defendants maintaining pipe lines constituting a nuisance near plaintiff's premises held not to be excused by the permission of the commissioners' court nor by freedom from negligence.—Sun Co. v. Wyatt, Tex., 107 S. W. Rep. 934.

108. **Officers**—Election to Fill Vacancy.—A congressional election held not an election at which a vacancy in the board of trustees of a city of the sixth class could be filled under Const. sec. 152.—Provence v. Lucas, Ky., 107 S. W. Rep. 755.

109. **Parent and Child**—Minor Employees.—In an action by a parent for personal injury to a minor employed by defendant, facts held insufficient to show contributory negligence defeating recovery.—Reeves v. Anniston Knitting Mills, Ala., 45 So. Rep. 702.

110. **Partition**—Estoppel.—A defendant held entitled to no interest in certain land in view of an estoppel by a partition by act of certain land in view of an estoppel by a partition by act of certain parties through whom he claimed.—Berryman v. Biddle, Tex., 107 S. W. Rep. 922.

111. **Pleading**—Amendment.—A new cause of action is not set up by amendment where the same substantial facts are pleaded merely in a different form, so that a recovery on the amended complaint would bar a recovery on the original complaint.—Alabama Consol. Coal & Iron Co. v. Heald, Ala., 45 So. Rep. 686.

112.——Facts or Conclusions.—In an action by stockholders against a corporation, corporate rights may be stated as legal conclusion, instead of stating the facts which support them, where they are stated merely as an inducement to the contract sued on.—Edwards v. National Window Glass Jobbers' Ass'n, N. J., 68 Atl. Rep. 800.

113.——Striking Out Matters.—In replevin by a mortgagee against an officer holding the property under an attachment in favor of a creditor of the mortgagor, where the answer is a general denial, the portion of the answer reciting the proceedings in the attachment suit should be stricken out on motion.—Beeler v. Perry, Mo., 107 S. W. Rep. 1008.

114. **Principal and Agent**—Authority of Agent.—A person dealing with an agent is bound to know that he has no authority to apply his private debt to such person to the payment of the debt due by such person to his principal.—Maloney Mercantile Co. v. Dublin Quarry Co., Tex., 107 S. W. Rep. 904.

115. **Prohibition**—Nature of Writ.—The writ of prohibition is an extraordinary writ, and is proper to be issued only in cases of extreme necessity.—Crittenden v. Town of Booneville, Miss., 45 So. Rep. 723.

116. **Quieting Title**—Relief to Defendant.—Where one placed improvements on land under a mistaken belief that the premises were within a tract conveyed to him, he and one claiming under him have the right to remove the improvements, as against the owner suing in equity to quiet title.—Jonesville Perpetual Building & Loan Ass'n of Jonesville v. Beverly, Ky., 107 S. W. Rep. 770.

117. **Real Actions**—Pleadings.—A complaint in a civil action at law may be amended any time before the cause is finally submitted to the jury and the retirement of the jury, if the form of action is not changed or a new cause of action substituted, or if there is not an entire change of the parties thereto.—Townes v. Dallas Mfg. Co., Ala., 45 So. Rep. 696.

118. **Receiving Stolen Goods**—Elements of Crime.—It is essential to a conviction for receiving stolen goods that the receiver have knowledge that the property was stolen at the time of its reception, or such notice as would put him on inquiry.—Minor v. State, Fla., 45 So. Rep. 818.

119. **Records**—Conclusiveness.—The judgment of the court substituting papers for lost papers in a criminal case cannot be attacked by affidavits, although it may be shown that the substituted papers have been incorrectly copied in the record.—Davis v. State, Tex., 107 S. W. Rep. 828.

120. **Reference**—Matter Subject to Reference.—Where accounts between parties are voluminous, comprising the history of scores of transactions covering a period of many years, and the correctness of some items is impugned, a reference may be ordered to state the account.—Speakman v. Vest, Ala., 45 So. Rep. 667.

121. **Religious Societies** — Incorporation. — Where members of a church, pursuant to a meeting duly held, formed a corporation under Code 1896, sec. 1303, a subsequent attempt by other members of the church to incorporate themselves to defeat such former incorporation was void.—Polk v. State, Ala., 45 So. Rep. 652

122. **Schools and School Districts**—Trustees.—Where a school trustee was elected to a three-year term as trustee and his election was certified to the county superintendent, it was not invalidated by the latter's failure to record his election as for the three-year term.—Gilbert v. Lucas, Ky., 107 S. W. Rep. 751.

123. **Specific Performance**—Pleading.—Complainant in specific performance who has not specially prayed that he have specific performance against one tenant in common under an agreement void as to a co-tenant may amend.—Campbell v. Hough, N. J., 68 Atl. Rep. 759.

124. **Statutes**—Construction.—Where two acts are passed at the same session of the legislature, they should be construed as one act, and, if possible, so that both may stand.—Garrison v. Richards, Tex., 107 S. W. Rep. 861.

125. **Street Railroads**—Failure to Repair Streets.—An acceptance by a street railway company of a franchise, coupled with the duty of keeping portions of the streets in repair, gives a right of action against the company to a traveler injured by neglect of that duty.—Milton v. Bangor Ry. & Electric Co., Me., 68 Atl. Rep. 826.

126. **Taxation**—Collection.—A deputy sheriff collecting taxes is not a mere debtor to the state and county, but sustains the relation of trustee to them.—Hill v. Fleming, Ky., 107 S. W. Rep. 764.

127.——Property Subject.—Vessels owned by a New Jersey corporation, having its principal office in one county, are not taxable in a municipality in another county, though registered pursuant to act of congress in the latter municipality.—American Mail S. S. Co. v. Crowell, N. J., 68 Atl. Rep. 752.

128. **Telegraphs and Telephones**—Rights on Bridges.—Where telegraph company obtained from bridge company right to maintain wires on bridge, and county condemned the bridge, it could not maintain bill to compel removal of wires; it having adequate remedy at law.—Bea-

ver County v. Central District & Printing Telegraph Co., Pa., 68 Atl. Rep. 846.

129. **Theaters and Shows**—Right to Admission.—A ticket of admission to a race track, a theater, a concert, or any such entertainment is a mere revocable license.—Buenzle v. Newport Amusement Ass'n, R. I., 68 Atl. Rep. 721.

130. **Trade-Marks and Trade-Names**—Unfair Competition.—The proprietor of the Hunyadi Janos Spring water held not entitled to an injunction to restrain the sale of a manufactured water under the label "Carbonated Artificial Hunyadi, Conforming to Fresenius' analysis of the Hunyadi Janos Springs," either on the ground of infringement of trade-mark or of unfair competition.—Saxlehner v. Wagner, U. S. C. C. of App., Sixth Circuit, 157 Fed. Rep. 745.

131. **Trespass**—Title to Land.—Where defendants in trespass for cutting trees on swamp land reconvened, asking to be recognized as owners of the land and of the trees taken therefrom, they opened the door to plaintiffs to prove up their title.—Frederick v. Goodbee, La., 45 So. Rep. 606.

132. **Trial**—Instructions.—Where all the evidence on the question of adverse possession in trespass to try title shows that possession began at the date of a certain deed in evidence, the court did not err in assuming that date from which to compute the period of limitation. —Dunn v. Taylor, Tex., 107 S. W. Rep. 952.

133.——Verdict.—Where a declaration contains two counts and the verdict finds for plaintiff on one specified count for an amount less than claimed in that count, held a finding for defendant on the count not mentioned.—Marianna Mfg. Co. v. Boone, Fla., 45 So. Rep. 754.

134. **Trusts**—Following Trust Property.—As between the cestui que trust and the trustee and persons claiming under him otherwise than by purchase without notice, all property belonging to the trust and the fruit thereof held to remain a subject of the trust.—Hill v. Fleming, Ky., 107 S. W. Rep. 764.

135.——Power of Beneficiary to Dispose of Property.—A deed creating a trust for the benefit of the wife of the grantor, with power to her to dispose of the property, construed, and held to authorize the wife, during the lifetime of the husband, to convey the premises.—Mandel v. Fidelity Trust Co., Ky., 107 S. W. Rep. 775.

136.——Right to Recover Trust Fund.—The mere misapplication of a trust fund does not create a general lien on the tort-feasor's estate, but to entitle the owner to recover such fund from a receiver of the trustee, it must be traced either in its original form or into specific property which passed to the receiver.—Board of Com'rs of Crawford County, Ohio, v. Strawn, U. S. C. C. of App., Sixth Circuit, 157 Fed. Rep. 49.

137.——Spendthrift Trusts.—An instrument held to have created a spendthrift trust so that neither the capital nor income was subject to claims against the beneficiary.—Castree v. Shotwell, N. J., 68 Atl. Rep. 774.

138. **Vendor and Purchaser**—Breach of Contract.—The owner of coal land agreeing to sell on payment of a certain sum on or before three months from date of delivery of deed cannot claim a forfeiture for default where no deed was tendered.—McHenry v. Mitchell, Pa., 68 Atl. Rep. 729.

139.——Contract of Sale.—Where defendant contracted to sell real estate to plaintiff, his heirs and assigns, but was unable to secure his wife's relinquishment of dower, he failed to make a marketable title, and was liable for breach of contract.—Vaughan v. Butterfield, Ark., 107 S. W. Rep. 993.

140.——Options.—An option is an unaccepted offer to sell and convey within the time fixed and on the conditions set forth in the written agreement.—Barnes v. Rea, Pa., 68 Atl. Rep. 836.

141. **Waters and Water Courses**—Defective Culvert.—Where a railroad company maintains a culvert adequate to carry off the natural and usual water, it is not liable for injuries to land resulting from extraordinary rainfall.—Wallingford v. Maysville & B. S. Ry. Co., Ky., 107 S. W. Rep. 781.

142. **Wills**—Construction.—Machinery, type, and material necessary to a newspaper plant held within the principle that a bequest for life of things whose use is their consumption vests in the legatee the absolute property therein.—Seabrook v. Grimes, Md., 68 Atl. Rep. 883.

143.——Construction by Trustees.—A provision of a will that the testator's trustees should conclusively determine all questions of construction without resort to the courts, held to authorize the trustees to determine what property the will applied to.—Couts v. Holland, Tex., 107 S. W. Rep. 913.

144.——Contest.—One contesting a will for testamentary incapacity and undue influence, and because the will was not duly executed, waives any right to object to the authority of proponent to make proof of the will.—Hodge v. Rambow, Ala., 45 So. Rep. 678.

145.——Life Estate.—A will held to entitle testator's widow to use the principal of the estate as far as she, acting in good faith, might deem necessary for her support in comfort.—Reed v. Reed, Conn., 68 Atl. Rep. 849.

146.——Undue Influence.—Where testatrix had testamentary capacity, and the will was executed with all requisite formalities, a contestant claiming undue influence must not only prove its existence, but show that it resulted in a will other than that testatrix would otherwise have made.—Byrnes v. Gibson, N. J., 68 Atl. Rep. 756.

147. **Witnesses**—Examination.—A question whether witness ever heard a person named state anything as to the ownership of lands held too broad.—East Coast Lumber Co. v. Ellis-Young Co., Fla., 45 So. Rep. 826.

148.——Explanation of Testimony.—In an equitable action against an heir and her husband for an accounting for property alleged to be withheld by them from the estate, where they are examined as witnesses for plaintiff as to their dealings with decedent, held that they should be allowed to testify to details of their dealings and explain them.—Eisentraut v. Cornelius, Wis., 115 N. W. Rep. 142.

149.——Impeachment.—A party discrediting a witness of the adverse party by the record of conviction of one having the same name as that of the witness need not identify the witness as the one convicted.—Clifford v. Pioneer Fireproofing Co., Ill., 83 N. E. Rep. 448.

150.——Right to Cross-Examine.—Under Const. 1901, art. 1, sec. 6, providing that the accused in criminal prosecutions has a right to be confronted by the witnesses against him, an accused has a constitutional privilege of cross-examining opposing witnesses.—Wray v. State, Ala., 45 So. Rep. 697.